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Perumahan NCK Sdn Bhd v Mega Sakti Sdn Bhd

HIGH COURT (KUALA LUMPUR) — COMPANIES WINDING UP NO D5–28–526 OF 2000
RAMLY ALI J
B 23 AUGUST 2005

Companies and Corporations — Winding up — Liquidators — Provisional liquidator — Application for remuneration of liquidators to be fixed by court — Principles to be applied

C The respondent was wound up. The winding-up order appointed the official receiver as the provisional liquidator. The respondent by its directors applied for an order to stay execution of winding up pending: (a) the outcome of a civil suit filed by the respondent against the petitioner; and (b) pending the disposal of the respondent's appeal against the winding-up order. The court granted the order. Several consequential orders were also made. Subsequently, D the civil suit was struck out and the appeal was dismissed. This was an application by the liquidators for their remuneration to be fixed by the court.

Held, allowing the application with costs:

E (1) Under s 232(3) of the Companies Act 1965 ('CA 1965') and r 142(3) of the Companies (Winding-Up) Rules 1972 ('Winding-Up Rules'), the liquidators were entitled to be paid remunerations for their works done on behalf of the court and the court had jurisdiction to determine the liquidators' remunerations (see para 15). Generally, a liquidator was not entitled to be paid until the liquidation was completed to the core. F However if the winding up process was unduly protracted, the liquidator may apply from time to time to the court to sanction payments provided evidence was led to show the actual work done up to the date of the application (see para 20). In the present case, the liquidators had carried out their works in the winding up of the company. There was no G evidence of any misconduct on their part. There was also no evidence to show that their appointment was defective. There was also no indication to show that the assets of the company were insufficient to meet their remuneration. Therefore, the court was satisfied that they were entitled to such remunerations (see para 22).

H (2) From the express wordings of s 233 of the CA 1965, the only parties that can be represented at the fixing of the remuneration were the liquidators and the creditors. The director of the respondent company had no right at all to participate or to be heard as such on any application to the court for fixing of the liquidator's remuneration. Shareholders, I however, were provided with a right to apply to court to vary or confirm the remuneration which had been fixed by agreement with the committee of inspection by virtue of sub-s (4) of s 232 of the CA 1965 (see para 23).

(3) In the present application the liquidators were asking that 'the retention by the liquidators of the sum of RM139,838.82 out of the assets of the respondent company towards payment of their remuneration be approved'. A provisional liquidator was entitled to retain out of the assets of the company, all costs and charges and expenses properly incurred by him (see para 26); *Re North Australian Properties Pty Ltd* (1983) 8 ACLR 436 and *Re Bridal Central Co Pty Ltd* (1985) 9 ACLR 481 followed.

(4) The remuneration to which the liquidators were entitled was for the work which was actually done. In the ordinary course, the process of fixing of remuneration came down essentially to ensuring that the work upon which the claim was based was work undertaken in the course of administration; and that the amount claimed for having done that work was fair and reasonable reward for it. Therefore, the burden of proof lied with the liquidators to show that the remuneration claimed was justifiable (see para 30). The benchmark in the assessment process was fairness and reasonableness. The court need not accept what was submitted at face value but would carefully scrutinise the facts placed before it, in deciding what aspect of the remuneration claimed was reasonable and justifiable (see para 31). In order to discharge that burden the liquidators in the present case have filed an affidavit in support in which they had given evidence of the work that were performed by the liquidators and the staff assisting the liquidators in administering the assets of the respondent company (see para 32). The tasks and duties of the liquidators which were performed were sufficiently detailed to enable the court to determine who did the works, how long it took for each particular category of work to be performed (see para 36). The particulars and description of the work performed were stated in detail to enable assessment to be made and to determine whether each task performed was performed in the ordinary course of administration of the assets of the respondent company (see para 37).

(5) There is no fixed scale of remuneration for a liquidator in winding up. However, s 232(3) of the CA 1965, had given discretion to the court to fix remuneration of the liquidator otherwise than on the scale on which the remuneration of the official receiver was fixed, namely on Table C of the Second Schedule of the Winding-Up Rules 1972 (see para 41). In the present application, the court had scrutinised the liquidators' claim in detail and was satisfied that the time scale basis as submitted, was fair and reasonable when compared to remuneration by percentage basis. Section 232(3) of the Companies Act 1965 clearly empowered the court to determine such remuneration either by way of 'percentage or otherwise' (see para 47).

[**Bahasa Malaysia summary**

Responden telah digulung. Perintah penggulungan telah melantik penerima rasmi sebagai penyelesai peruntukan. Responden melalui pengarah-pengarahnya telah memohon untuk satu perintah menggantung pelaksanaan penggulungan sementara menunggu: (a) keputusan guaman sivil yang difailkan oleh responden terhadap pempetisyen; dan (b) rayuan responden terhadap perintah penggulungan selesai. Mahkamah telah membenarkan perintah tersebut. Beberapa perintah lain juga telah dibuat. Berikutan itu, guaman sivil telah dibatalkan dan rayuan telah ditolak. Ini adalah permohonan oleh penyelesai-penyelesai untuk gaji ditetapkan oleh mahkamah.

Diputuskan, membenarkan permohonan tersebut dengan kos:

(1) Di bawah s 232(3) Akta Syarikat 1965 ('AS 1965') dan k 142(3) Kaedah-Kaedah (Penggulungan) Syarikat 1972 ('Kaedah-Kaedah Penggulungan'), penyelesai-penyelesai berhak dibayar gaji untuk tugas yang telah mereka laksanakan bagi pihak mahkamah dan mahkamah mempunyai bidang kuasa untuk menentukan gaji penyelesai-penyelesai tersebut (lihat perenggan 15). Secara umum, seorang penyelesai tidak berhak untuk dibayar gaji sehingga likuidasi diselesaikan sepenuhnya. Namun begitu jika proses penggulungan terus berpanjangan, penyelesai boleh memohon dari masa ke semasa ke mahkamah untuk mensanksikan bayaran dengan syarat keterangan dikemukakan untuk menunjukkan tugas sebenar yang dibuat sehingga tarikh permohonan tersebut (lihat perenggan 20). Dalam kes semasa, penyelesai-penyelesai telah melaksanakan tugas mereka dalam penggulungan syarikat itu. Tiada keterangan tentang salah laku di pihak mereka. Tiada keterangan untuk menunjukkan bahawa pelantikan mereka adalah defektif. Juga tiada tanda untuk menunjukkan bahawa aset syarikat adalah tidak mencukupi untuk membayar gaji mereka. Oleh itu, mahkamah berpuas hati bahawa mereka berhak mendapat gaji (lihat perenggan 22).

(2) Berdasarkan perkataan-perkataan nyata s 233 AS 1965, pihak-pihak yang boleh diwakili untuk penetapan gaji adalah penyelesai-penyelesai dan pemiutang-pemiutang. Pengarah syarikat responden tidak mempunyai hak langsung untuk terlibat atau mendengar apa-apa permohonan kemahkamah untuk menetapkan gaji penyelesai. Pemegang-pemegang saham, bagaimanapun, diperuntukkan dengan hak untuk memohon kepada mahkamah untuk mengubah atau mengesahkan gaji yang telah ditetapkan oleh perjanjian dengan jawatankuasa siasatan menurut sub-s (4) kepada s 232 AS 1965 (lihat perenggan 23).

(3) Dalam permohonan semasa, penyelesai-penyelesai meminta supaya 'the retention by the liquidators of the sum of RM139,838.82 out of the assets of the respondent company towards payment of their remuneration be approved'. Penyelesai peruntukan berhak untuk dibayar daripada

aset-aset syarikat, kesemua kos dan caj serta perbelanjaan yang sebenarnya ditanggung oleh beliau (lihat perenggan 26); *Re North Australian Properties Pty Ltd* (1983) 8 ACLR 436 dan *Re Bridal Central Co Pty Ltd* (1985) 9 ACLR 481 diikut.

(4) Gaji yang penyelesai berhak dapat untuk tugas tersebut telah pun dilaksanakan. Biasanya, proses menetapkan gaji khususnya adalah untuk memastikan yang tugas yang mana tuntutan dibuat adalah tugas yang telah dilaksanakan dalam pentadbiran biasa; dan bahawa jumlah yang dituntut untuk tugas yang telah dibuat adalah adil dan munasabah. Oleh itu, beban bukti terletak atas penyelesai-penyelesai untuk menunjukkan bahawa gaji yang dituntut dapat dijustifikasikan (lihat perenggan 30). Tanda aras dalam proses penilaian tersebut adalah keadilan dan kemunasabahan. Mahkamah tidak perlu menerima apa yang dikemukakan pada dasarnya tetapi perlu meneliti fakta yang dihadapkan, dalam memutuskan apakah aspek gaji yang dituntut yang adil dan dijustifikasikan (lihat perenggan 31). Bagi tujuan melepaskan beban tersebut, penyelesai-penyelesai dalam kes semasa telah memfailkan satu afidavit sokongan yang mana mereka telah mengemukakan bukti tugas yang dilaksanakan oleh mereka dan kakitangan yang membantu mereka dalam mentadbirkan aset-aset syarikat responden (lihat perenggan 32). Tanggungjawab dan tugas penyelesai-penyelesai yang dilaksanakan telah dikemukakan dengan terperinci untuk membolehkan mahkamah memutuskan siapa yang melaksanakan tugas tersebut, berapa lama telah diperlukan untuk setiap kategori tugas tersebut dilaksanakan (lihat perenggan 36). Butiran dan gambaran tugas yang dilaksanakan telah dinyatakan dengan terperinci untuk membolehkan penilaian dibuat dan untuk menentukan sama ada setiap tugas dilaksanakan dalam cara biasa pentadbiran aset-aset syarikat responden (lihat perenggan 37).

(5) Tiada skala tetap gaji untuk penyelesai dalam penggulungan. Namun begitu, s 232(3) AS 1965, memberikan budi bicara kepada mahkamah untuk menetapkan gaji penyelesai jika tidak berdasarkan skala yang mana gaji penerima rasmi ditetapkan, khususnya Susunan C dalam Jadual Kedua kepada Kaedah-Kaedah Penggulungan 1972 (lihat perenggan 41). Dalam permohonan semasa, mahkamah telah meneliti tuntutan penyelesai dengan terperinci dan berpuas hati bahawa asas skala masa seperti yang dikemukakan, adalah adil dan munasabah jika dibandingkan dengan gaji berdasarkan peratusan. Seksyen 232(3) AS 1965 jelas memberikan kuasa kepada mahkamah untuk menentukan gaji sedemikian sama ada melalui peratusan atau sebaliknya (lihat perenggan 47).]

Notes

For cases on liquidators, see 3(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1056–1087.

Cases referred to

Beni-Feikai Mining Co Ltd, Re [1933] All ER Rep 693 (refd)
Bridal Central Co Pty Ltd, Re (1985) 9 ACLR 481 (folld)
Burns Philip investment Pty Ltd v Dickens (No 2) 10 ACSR 626 (refd)
Econ Corp Ltd (in provisional liquidation) (No 2), Re [2004] 2 SLR 264 (refd)
King Constructions Ltd, Re [1961] QWN 30 (refd)
Liquidator of Action Waste Collection Pty Ltd) (In Liquidation) v Greater Pacific General Insurance (1983) ACLC 518 (refd)
Nationwide News Pte Ltd v Samalot Enterprises Pty Ltd, Re (1986) 4 ACLC 366 (refd)
New Zealand Times Co, Re [1941] NZLR 677 (refd)
North Australian Properties Pty Ltd, Re (1983) 8 ACLR 436-437 (folld)
Perdana Merchant Bankers Bhd, Re [1997] 3 MLJ 435 (refd)
Trustees Executors & Agency Co Ltd (Receivers and Managers Appointed), Re (1957) 9 ACLR 497 (refd)
Wun Rose & Co, Re (1897) 3 ALR 65 (refd)

Legislation referred to

Companies (Consolidation) Act 1908 [UK] s 171
Companies (Winding Up) Rules 1972 r 142(3), Second Schedule, Table C
Companies Act 1948 [UK] s 267
Companies Act 1965 s 232(3)
Companies Act 1965 ss 232, (3), (4), 233, 236, 247(3)
Companies Code [Vic] s 373(2)
Companies Ordinance 1962 [Aust] s 232(2)

Izabella De Silva (Iza Yeoh & Kit) for the liquidators.
Mahathir Abdullah (Raslan Loong) for the respondent.

Ramly Ali J:

[1] This grounds of judgment are in respect of the liquidators' application (vide encl 49) dated 10 August 2004 for the following orders:

(a) that the liquidators' remuneration from 1 May 2002 to 15August 2003 be fixed on time cost basis in the amount of RM441,416.03;

(b) that the liquidators' remuneration from 16 August 2003 to 31May 2004 be fixed on time cost basis in the amount of RM110,284.12;

(c) that all costs and expenses incurred by the liquidators from 1 May 2002 to 31 May 2004 be approved;

(d) that the retention by the liquidators of the sum of RM139,838.82 out of the assets of the respondent towards payment of their remuneration be approved;

(e) that the costs of this application on solicitor-client basis be paid out of the assets of the respondent; and

(f) further or other relief as this court thinks fair and expedient.

CHRONOLOGY OF EVENTS

[2] The respondent was wound up on 7 February 2001. The winding up order appointed the official receiver as the provisional liquidator.

[3] On 10 March 2001, the respondent by its directors, applied by a summons in chambers for an order to stay execution of winding up pending:

(a) the outcome of Civil Suit No S7–22–667 of 2000 filed by the respondent against the petitioner; and/or

(b) pending the disposal of the respondent's appeal against the winding up order.

[4] On 29 April 2002, on the application of the official receiver, this court appointed Ler Cheng Chye and Lum Tuck Cheong as the liquidators of the respondent.

[5] On 10 October 2002, the Civil Suit No S7–22–667 of 2000 was struck out.

[6] On 14 August 2003, this court made an order in terms of the respondent's summon in chambers staying execution of the winding up order pending the appeal against the winding up order. Several consequential orders were also made.

[7] On 11 September 2003, the petitioner filed a notice of appeal against the order of 14 August 2003.

[8] On 1 October 2003, the respondent by its directors applied for the reinstatement of Civil Suit No S7–22–667 of 2000.

[9] On 13 November 2003, the liquidators applied for a stay of execution of the order made on 14 August 2003 (encl 38).

[10] The appeal against the winding up order was heard by the Court of Appeal on 25 February 2004 and was dismissed.

[11] On 11 March 2004, the Civil Suit No S7–22–667 of 2000 was reinstated.

[12] On 16 April 2004 an order in terms of encl 38 was made whereby leave was granted for the Liquidators remuneration to be fixed by the court.

LIQUIDATORS' ENTITLEMENT TO REMUNERATION AND POWERS OF THE COURTS TO DETERMINE LIQUIDATORS' REMUNERATION

[13] The liquidators are appointed by the court. They are therefore officers of the court and have acted *bona fide* as such with the knowledge that their costs, expenses and remuneration incurred would be duly paid out of the assets of the wound up company (the respondent). Section 232(3) of the Companies Act 1965, provides that the court is empowered to determine the remuneration of the liquidator by way of percentage or otherwise where the remuneration cannot be determined by a committee of inspection or the creditors. Section 232(3) provides:

> 232(3) A liquidator other than the official receiver shall be entitled to receive such salary or remuneration by way of percentage or otherwise as is determined:
>
> (a) by agreement between the liquidator and the committee of inspection (if any);
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> (b) failing such agreement or where there is committee of inspection by a resolution passed at a meeting of creditors by a majority of not less than three-fourths in value and one-half in number of the creditors present in person or by proxy and voting at the meeting and whose debts have been admitted to vote, which meeting shall be convened by the liquidator by a notice to each creditor to which notice shall be attached a statement of all receipts and expenditure by the liquidator, and the amount of remuneration sought by him; or
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> (c) failing a determination in a manner referred to in para (a) or (b), by the court.

[14] Rule 142(3) of the Companies (Winding Up) Rules 1972 provides that, unless the court shall otherwise order, the remuneration of the liquidators shall be fixed by the scale of fees and percentages for the time being payable on realisations and distributions by the official receiver as liquidator. Rule 142 of the Companies (Winding Up) Rules 1972 is reproduced below:

> Rule 142(1)
>
> (i) The remuneration of a liquidator, unless the court shall otherwise order shall be fixed by the committee of inspection, and shall be in the nature of a commission or percentage of which one part shall be payable on the amount realised, after deducting the sums (if any) paid to secured creditors (other than debenture holders), out of the proceeds of their securities, and the other part on the amount distributed in dividend.
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> (ii) If the official receiver is of the opinion that the remuneration of a liquidator as fixed by the committee of inspection is unnecessarily large, the official receiver may apply to the court and thereupon the court shall fix the amount of the remuneration of the liquidator.

(iii) If there is no committee of inspection the remuneration of the liquidator shall, unless the court shall otherwise order, be fixed by the scale of fees and percentages for the time being payable on realisation and distribution by the official receiver as liquidator.

(iv) This rule shall only apply to a liquidator appointed in a winding up by the court.

[15] It is clear that under s 232(3) of the Companies Act 1965 and r 142(3) of the Companies (Winding Up) Rules 1972, Liquidators are entitled to be paid remunerations for their works done on behalf of the court and the court has jurisdiction to determine the liquidators remunerations.

[16] In *Nationwide News Pte Ltd v Samalot Enterprises Pty Ltd* (1986) 4 ACLC 366 at p 389, Mc Lelland J (Supreme Court of New South Wales) held:

> Section 373 confers on a liquidator a statutory entitlement to remuneration and confers on the court a statutory power to determine that remuneration, neither of which are dependent upon the continued subsistence of the order appointing the liquidator but only upon the liquidator's status as such.

[17] The learned judge in that case further said:

> Furthermore, I have little doubt that a liquidator, or provisional liquidator who is entitled to remuneration would normally have an equitable lien over the assets under his administration to secure payment of that entitlement, analogous to the lien to which a court appointed receiver is entitled ...

[18] Section 373 of the Companies (New South Wales) Code is in *pari material* with s 232 of the Malaysian Companies Act 1965.

[19] In *Re Wun Rose & Co* (1897) 3 ALR 65, it was held that a liquidator is entitled to a reasonable remuneration for his services in winding up the company. In *Re Perdana Merchant Bankers Bhd* [1997] 3 MLJ 435 at p 466, Abdul Malik Ishak J held, that:

> Three instances exist where the liquidator may lose his remunerations. Firstly, when he is deprived of his remuneration on the ground of misconduct Secondly, where the assets are insufficient to meet his remuneration (*Re Massey; Re Freehold Land & Brickmaking Co* (1870) LR 9 Eq 367 and *Resanitary Burial Association* [1900] 2 Ch 289). Thirdly, where his appointment is defective (*Re Allison Johnson & Foster Ltd* [1904] 2 KB 327 (CA) as applied in *Re Kyra Nominees Pty Ltd* (1980) 5 ACLR 60).

[20] Generally, a liquidator is not entitled to be paid until the liquidation is completed to the core (see *Re New Zealand Times Co* [1941] NZLR 677). However if the winding up process is unduly protracted, the liquidator may apply from time to time to the court to sanction payments provided evidence is led to show the actual work done up to the date of the application, (see *Re King Constructions Ltd* [1961] QWN 30; and *Re Crawford (as Liquidator of Action Waste Collection Pty Ltd) (In Liquidation) v Greater Pacific General Insurance* (1983) ACLC 518).

[21] In *Re Beni-Feikai Mining Co Ltd* [1933] All ER Rep 693 at p 698, Maugham J held that the court has jurisdiction under s 171 of the Companies (Consolidation) Act 1908 (now s 267 of the Companies Act 1948 (UK), to provide for liquidators remuneration in cases where the realisation of property in the winding up is delayed. The said s 171 is equivalent to s 247(3) of the Malaysian Companies Act 1965, which provides that the court has jurisdiction to order that the costs and in realisation of the company's assets. Section 247(3) is reproduced below:

> (3) The court may, in the event of the assets being insufficient to satisfy the liabilities, make an order as to the payment out of the assets of the costs charges and expenses incurred in the winding up in such order of priority as the court thinks fit.

[22] In the present case, the liquidators had carried out their works in the winding up of the company. There is no evidence of any misconduct on their part. There is also no evidence to show that their appointment was defective. There is also no indication to show that the assets of the company were insufficient to meet their remuneration. Therefore, the court is satisfied that they are entitled to such remunerations.

WHO CAN BE HEARD AT THE LIQUIDATORS' APPLICATION FOR REMUNERATION?

[23] From the express wordings of s 233 of the Companies Act 1965, the only parties that can be represented at the fixing of the remuneration are the liquidators and the creditors. The director of the respondent company has no right at all to participate or to be heard as such on any application to the court for fixing of the liquidator's remuneration. Shareholders, however, are provided with a right to apply to court to vary or confirm the remuneration which has been fixed by agreement with the committee of inspection by virtue of sub-s (4) of s 232, which provides:

> 232(4) Where the salary or remuneration of a liquidator is determined in the manner specified in sub-s (3)(a) the court may, on the application of a member or members whose shareholding or shareholdings represents or represent not less than ten per centum of the issued capital of the company, confirm or vary the determination.

[24] Therefore, in the present application Koh Kien Hong who was a director of the respondent company (not a shareholder) has no right to be heard on the hearing of the present application by the liquidators. The court has no power to give Koh Kien Hong leave to be heard.

POWER TO RATIFY RETENTION OF MONIES BY LIQUIDATORS

[25] In prayer (d) of the present application (encl 49) the liquidators are asking that 'the retention by the Liquidators of the sum of RM139,838.82 out of the assets of the respondent company towards payment of their remuneration be approved.

[26] In *Re North Australian Properties Pty Ltd* (1983) 8 ACLR 436-437, citing *inter alia* Mc Pherson's *Law of Company Liquidation* (2nd Ed) at p 85, Forster CJ (of the Supreme Court of the Northern Territory of Australia) pointed out that a provisional liquidator was entitled to retain out of the assets of the company, all costs and charges and expenses properly incurred by him. In his concluding remarks, the learned judge held that the provisional liquidator is entitled to all proper costs and expenses of his work as provisional liquidator and that the termination of his appointment does not operate to prevent the fixing of that remuneration and his retention of funds in his hands to meet it.

[27] In *Re Bridal Central Co Pty Ltd* (1985) 9 ACLR 481, the provisional liquidator appropriated a sum of $14,925 from the funds held by him for his costs representing charges for professional services rendered in the winding up. The Supreme Court of the Australian Capital Territory held that the right of a provisional liquidator to remuneration was based on s 232(2) of the Companies Ordinance 1962 and that he was entitled to apply for ratification of the payments made by him and the court was entitled to entertain the application.

[28] In the present application, the same principals would also apply and the court is entitled to entertain the application in prayer (d) of encl 49 for ratification of the amounts paid by the liquidators on account of their remunerations.

PRINCIPLES FOR DETERMINING REMUNERATION OF LIQUIDATORS

[29] The Companies Act 1965 clearly provides for the payment of remuneration of liquidators and empowers the court to fix the amount if there is a failure to do so by the committee of inspection or the creditors. In determining the remuneration, the court must start from the position that the liquidator is entitled to reasonable remuneration (see *Re Wun Ross & Co*).

[30] The remuneration to which the liquidators are entitled is for the work which was actually done. In the ordinary course, the process of fixing of remuneration comes down essentially to ensuring that the work upon which the claim was based was work undertaken in the course of administration; and that the amount claimed for having done that work is fair and reasonable reward for it. Therefore, the burden of proof lies with the liquidators to show that the remuneration claimed is justifiable.

[31] The benchmark in the assessment process is fairness and reasonableness. The court need not accept what is submitted at face value but will carefully scrutinise the facts placed before it, in deciding what aspect of the remuneration claimed is reasonable and justifiable. The court will not blindly accept that what is said as done is done.

[32] In order to discharge that burden the liquidators in the present case have filed an affidavit in support in which they have given evidence of the work that were performed by the liquidators and the staff assisting the liquidators in administering the assets of the respondent.

[33] The liquidators have provided a summary of their remuneration for two periods as follows:

(1) from 1 May 2002 up to 15 August 2003 based on time cost basis in exh 1 to the affidavit in support affirmed on 6 August 2004 by Ler Cheng Chye and are seeking the court's approval of the balance sum of RM329,201.51 after appropriating the sum of RM139,838.82 from funds in the liquidators' hands on account which the liquidators are seeking in prayer (d) of the summons-in-chambers to be ratified by this court.

(2) from 16 August 2003 to 31 May 2004 also based on time cost basis in exh 2 annexed to the aforesaid affidavit and are seeking this court's approval of the liquidators' remunerations on time cost basis in the amount of RM110,284.12.

THE FIRST PERIOD (1 MAY 2002 TO 15 AUGUST 2003)

[34] Exhibit 1 annexed to the supporting affidavit has been prepared by the liquidators to show the following information:

(i) A summary of remuneration and out of pocket expenses for the period form 1 May 2002 to 15 August 2003 showing total of each month's remuneration, service tax and out of pocket expenses as well as the total sum claimed by the liquidators for the aforesaid period.

(2) A summary of the staff employed and the number of hours utilised by each staff for the period from 1 May 2002 to 15 August 2003.

(3) Subsequent pages of exh 1 show a note of fees for each month appearing in the summaries above followed by detailed monthly analysis of staff employed each month, the number of hours utilised each month and detailed and comprehensive description of tasks and duties performed on the various days of each month.

THE SECOND PERIOD (16 AUGUST 2003 TO 31 MAY 2004)

[35] Exhibit 2 of the supporting affidavit has been prepared by the Liquidators to show the following':

(1) A summary of remuneration and out of pocket expenses for the period from 16 August 2002 to 31 May 2004 as well as the total sum claimed by the liquidators.

(2) A summary of staff employed and the number of hours utilised by each grade of staff for the period from 16 August 2003 to 31 May 2004.

(3) Subsequent pages of exh 2 contain a note of fees per month appearing in the summaries above followed by monthly analysis of staff employed each month and detailed and comprehensive description of the tasks and duties performed on the various days of each month.

[36] The tasks and duties of the liquidators which were performed during the period commencing from 1 May 2002 to 15 August 2003 and during the period commencing from 16 August 2003 to 31 May 2004 are sufficiently detailed to enable this court to determine who did the works, how long it took for each particular category of work to be performed.

[37] The particulars and description of the work performed are stated in detail to enable assessment to be made and to determine whether each task performed was performed in the ordinary course of administration of the assets of the respondent.

[38] The petitioner's liquidator is himself administration the affairs of the petitioner in a voluntary winding up of the petitioner; and is therefore in a position to check and/or verify each and every task and would be able to object if any of the work performed was not performed in the course of discharging the powers and duties of the liquidators of the respondent under s 236 of the Companies Act 1965.

[39] The liquidators have perused the two affidavits by the liquidator of the petitioner on 27 September 2004 and 25 October 2004 and filed herein. Aperusal of these two affidavits will show that:

(1) the liquidator of the petitioner has not objected to any of the tasks performed or that the tasks were performed unnecessarily or not for the purpose of carrying out the duties of the liquidators' of the respondent.

(2) no objection was taken to the use of the scale to assess the remuneration claimed by the liquidators of the respondent.

(3) no objection was taken to the charge out rate employed by the liquidators in calculating their remuneration.

[40] The fact that the petitioner's liquidator has not made objections to the above three factors must be taken into account by this court in fixing the remuneration of the liquidators of the respondent. This is because the petitioner's liquidator would be aware of the common practice in Malaysia by private liquidators to be remunerated on time basis rather than on percentage basis contained in Table C of the Second Schedule of the Companies (Winding Up) Rules 1972.

SCALE OF REMUNERATION

[41] There is no fixed scale of remuneration for a liquidator in winding up. However, s 232(3) of the Companies Act 1965, has given discretion to the court to fix remuneration of the liquidator otherwise than on the scale on which the remuneration of the official receiver is fixed, namely on Table C of the Second Schedule of the Companies (Winding Up) Rules 1972.

[42] In the book authored by the Hon Mr Justice BH Mc Pherson entitled '*The Law of Company Liquidation* (1987, 3rd Ed) at p 223, the learned author discusses the scale of remuneration of liquidators as follows:

> (3) Scale of remuneration
>
> There is no fixed scale of remuneration for a liquidator in winding up. The practice, however, is to fix his remuneration either on a percentage basis calculated upon the value of assets collected or according to the amount of time expended by the liquidator; but a lump sum is sometimes given, and the Act also permits payment of a salary. In Australia the time basis of assessment appears to be more common; but in England it has been said that the courts favour the percentage basis because this means that remuneration is calculated according to results achieved — a small estate pays a small sum and a large estate a large sum, depending on the amount of divisible assets, whereas the time spent by the liquidator and his clerks has been regarded as affording a most unreliable test which is to be used only where the assets realized are so small that assessment on a percentage basis would not operate to give a fair remuneration for the work involved.

[43] The Supreme Court of Victoria in *Re Trustees Executors & Agency Co Ltd (Receivers and Managers Appointed)* (1957) 9 ACLR 497 considered on application of the provisional liquidator, partners of the firm of Peat, Marwick, Mitchell & Co and employees of that firm pursuant to s 373(2) of the Companies (Vic) Code during the period of their appointment. At p 498, Hampel J said:

> The amounts claimed by the applicants were based upon hourly rates recommended by the insolvency Practitioners Association of Australia. Although I retain discretion in the matter (see Standard Insurance Co Ltd (in Hq) (1967) VR 600) Mr Foster, who appeared on behalf of the Commissioner for Corporate Affairs, did not dispute the applicants' entitlement to the amount claimed. The masters and judges of this court have in the past considered this scale as reasonable and appropriate in relation to the remuneration of liquidators.

[44] Accordingly, in that case, the judge then proceeded to approve the liquidator's claim as per the exhibits annexed to the liquidator's affidavit in support, where the rate was based time scale basis, ie hourly rate.

[45] In *Burns Philip investment Pty Ltd v Dickens (No. 2)* 10 ACSR 626 (Supreme Court of New South Wales — Equity Division), the court accepted time scale basis for calculating the liquidator's remuneration. Young J at p 631, stated:

... the system is one which is now more popular that it was in the 1930's, has been recognised in the approved scales for company liquidations.... Accordingly, the mere fact that the charges made by Mr Dickens and Ernst & Young were on time basis is not, I believe, a reason for challenging their remuneration.

[46] In the present application the liquidators seek leave of this court to approve the time scale basis used by the liquidators to quantify their remunerations. Time spent by liquidators is only one of the many criteria that the court will take into account. The importance of this criteria will vary from case to case, from being a possibly critically factor in one case or just another matter for consideration in another, (see *Re Econ Corp Ltd (in provisional liquidation) (No 2)* [2004] 2 SLR 264). The court will still have to balance various impinging considerations like reasonableness and scope of work. The court will have to satisfy itself that there is no issues of 'over servicing' or 'over manning' in the matter. The basis ultimately applied must be characterised by fairness and reasonableness.

[47] In the present application, the court had scrutinised the liquidators' claim in detail and satisfied that the time scale basis as submitted, is fair and reasonable when compared to remuneration by percentage basis. Section 232(3) of the Companies Act 1965 clearly empowered the court to determine such remuneration either by way of 'percentage or otherwise'. In the present application exh LCC–5 of the liquidators' affidavit affirmed on 6 August 2004 shows that on collection, the liquidators would be entitled to RM871,129 based on percentage basis as compared to RM469.040.34 based on time scale basis.

CONCLUSION

[48] For reasons adumbrated above, the court allowed the liquidators application vide encl 49 with costs.

Application allowed with costs.

Reported by Peter Ling